

From: "Osa Armi" <Armi@smwlaw.com>
To: <docket@energy.state.ca.us>
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Subject: Docket 03-IEO-01 2004 Transmission Update

To whom it may concern:

Pursuant to discussions during the CEC's Workshop on the 2004 Transmission Update held on April 5, 2004, please include the following attached document in the CEC's Docket 03-IEO-01 "2004 Transmission Update":

COMMENTS OF THE CITY OF TEMECULA, CITY OF HEMET, CITY OF MURRIETA AND
SAVE SOUTHWEST RIVERSIDE COUNTY OPPOSING THE PROPOSED AMENDMENT
TO
COMMISSION GENERAL ORDER 131-D

Pursuant to the instructions provided with the notice of the CEC's Workshop on the 2004 Transmission Update held on April 5, 2004, I will also be providing your docket office with one paper copy by mail.

Best,
Osa Armi
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Voice: 415/552-7272
Fax: 415/552-5816

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on policies and practices for the Commission's transmission assessment process.	Rulemaking 04-01-026
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COMMENTS OF THE
CITY OF TEMECULA, CITY OF HEMET, CITY OF MURRIETA
AND SAVE SOUTHWEST RIVERSIDE COUNTY
OPPOSING THE PROPOSED AMENDMENT TO
COMMISSION GENERAL ORDER 131-D

**Marc B. Mihaly
Osa L. Armi
Janette E. Schue
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: 415-552-7272
Facsimile: 415-552-5816
Email: armi@smwlaw.com**

**Attorneys for
Cites of Temecula, Hemet
and Murrieta
Save Southwest Riverside County**

Dated: April 6, 2004

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COMMENTS OF THE
CITY OF TEMECULA, CITY OF HEMET, CITY OF MURRIETA
AND SAVE SOUTHWEST RIVERSIDE COUNTY
OPPOSING THE PROPOSED AMENDMENT TO
COMMISSION GENERAL ORDER 131-D

Pursuant to the Order Instituting Rulemaking filed January 22, 2004 (“OIR”), the Cities of Temecula, Hemet and Murrieta, together with the community group Save Southwest Riverside County (collectively “Riverside Parties”) hereby submit these timely comments regarding: (1) proposed revisions to Public Utilities Commission (“CPUC” or “Commission”) General Order 131-D (“GO 131-D”); and (2) proposed reliability standards submitted in this proceeding by the California Independent System Operator (“ISO”).

The Cities of Temecula, Hemet and Murrieta are municipal corporations located in southwest Riverside County. The combined population of the three cities is more than 200,000 people. Save Southwest Riverside County (“SSRC”) is a southwest Riverside County community group formed in response to the 2001 proposal of San Diego Gas & Electric Company (“SDG&E”) to construct a 500 kV electrical transmission line known as the Valley-Rainbow Interconnect Project (“Valley-Rainbow Project”). The Riverside Parties actively opposed the Valley-Rainbow Project and participated in the CPUC’s proceeding that ultimately denied SDG&E’s application for a certificate of public convenience and necessity (“CPCN”) for that project.

Due to their involvement in the Valley-Rainbow case, the Riverside Parties are intimately familiar with the nature of the ISO and the CPUC procedures for assessing whether a proposed transmission project is needed. Based on that experience, the Riverside Parties have concluded that the CPUC GO 131-D amendments proposed by the OIR are illegal under the Public Utilities Code and the California Environmental Quality Act. The delegation would also violate constitutional procedural due process guarantees and threaten effective public participation in the CPCN process. In addition, the proposed delegation rests on a number of incorrect assumptions and could result in unintended adverse consequences. The Riverside Parties therefore submit these comments opposing the amendments to GO 131-D proposed in the OIR.

I. The CPUC Cannot Legally Delegate its Authority to Determine Whether a Proposed Transmission Line is Needed.

The OIR proposes to modify GO 131-D to provide that in all future CPCN proceedings for proposed transmission lines, the CPUC will adopt, without question and without public input, the opinion of the ISO regarding whether such lines are needed.¹ See OIR at 11. Under the proposed revisions to GO 131-D, the CPUC

¹ The Commission is: (1) proposing to amend GO 131-D to defer to the ISO regarding economic need determinations; and (2) considering deferring to ISO

would be prohibited from “revisiting the question of need” and the CPUC’s only remaining involvement in the need determination would be to assess whether the ISO applied standard methodologies for evaluating need. *See* OIR at 5, 9, 11.

This massive delegation of authority and responsibility to the ISO would be illegal. As the Commission itself recently stated, deferring to the ISO on the question of need “would constitute an unlawful delegation of our authority, giving the ISO power that the Legislature has not bestowed on it.” Decision 03-05-038 (May 8, 2003) at 12.

A. Under Public Utilities Code Section 1001, the CPUC Must Make Need Determinations, and it Cannot Delegate this Authority to the ISO.

The Legislature, which under the State Constitution has plenary and unrestricted power over the authority and jurisdiction of the CPUC (*see* Cal. Const. art. XII, § 5), has mandated that the CPUC make need determinations. Pub. Util. Code § 1001. Thus, the CPUC must make need determinations and cannot delegate this authority to another entity.

1. Public Utilities Code Section 1001 Requires the CPUC to Make Need Determinations.

The Legislature has, in section 1001 of the Public Utilities Code, imposed on the CPUC the obligation to determine whether a major new transmission line is needed. Section 1001 provides that: “No . . . electrical corporation . . . shall begin the construction of a . . . line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.” Pub. Util. Code § 1001. This need determination is fundamental to the regulation of public utilities, as it serves the purposes of providing for coordinated service, regulating the facilities of the utilities, and protecting ratepayers from paying for unnecessary facilities. Cal.Jur.3d. (2000) Pub. Util., § 36; GO 131-D; Pub. Util. Code §§ 1001-1003.5. Under the plain language of section 1001, this fundamental power, is expressly delegated to the Commission by the Legislature. Because the State Constitution grants the Legislature express power to control the procedures of the CPUC and “plenary power” over the authority of the Commission (*see* Cal. Const. art. XII, §§ 2, 5), the CPUC cannot sub-delegate its legislatively granted authority to another entity. *See Cal. Sch. Employees Ass’n v. Pers. Comm’n of the Pajaro Valley Unified Sch. Dist.*, 3 Cal.3d 139, 144 (1970) (holding that the powers conferred upon agencies by the Legislature are in the nature of “public trusts” and cannot be surrendered or delegated in the absence of express statutory authorization). The OIR’s proposal to delegate CPCN need determinations to the ISO ignores the statutory and constitutional requirements that the CPUC carry out its legislatively mandated duties.

regarding reliability need determinations. *See* OIR at 11. Since the OIR (and the attachments to it) make clear that the ultimate proposal is to defer to the ISO on both economic *and* reliability need determinations (*see id.*), we will use the phrase “need determinations” to refer to both economic and reliability need determinations throughout these comments.

2. Recent Changes to the Public Utilities Code Have Not Altered the CPUC's Duties Under Section 1001.

The CPUC has consistently considered CPCN applications and made need determinations pursuant to section 1001. *See, e.g., Pacific Gas & Electric Company CPCN for the California-Oregon Transmission Project*, 1991 Cal. P.U.C. LEXIS 223 (1991). The CPUC's obligation to make need determinations under state law has not changed since the enactment of section 1001. Most notably, the energy restructuring legislation of 1996 (Assembly Bill ("AB") 1890), which established the ISO, made no amendment to Public Utilities Code section 1001. *See* AB 1890 (1995-1996 Reg. Sess.).

With AB 1890, the Legislature assigned to the ISO the task of "efficient use and reliable operation" of the transmission grid. *See* Pub. Util. Code § 345. Toward that end, the ISO is authorized "to secure generating and transmission resources necessary to guarantee achievement" of reliability criteria (*id.* at § 346), and to "adopt inspection, maintenance, repair, and replacement standards" for the facilities under its control (*id.* at § 348). AB 1890 authorized the ISO "to secure" resources by such mechanisms as reliability-must-run contracts, and place them under its control, but AB 1890 did not authorize the ISO – a statutorily created nonprofit corporation (Pub. Util. Code § 3455.(a)) – to conduct the regulatory review and approval of transmission or generation facilities in the first instance. Review and approval of new transmission facilities, including determination of whether such facilities are a public necessity, rests – as always – with the CPUC. *See* Pub. Util. Code § 1001.

As the Commission recently stated in its decision regarding the CPCN application for the Tri Valley Project, "ISO has responsibility to ensure the reliability of the State's electrical system pursuant to Pub. Util. Code § 345. However, ensuring reliability and deciding that a particular transmission project should be built are two separate issues." Decision 01-10-029 (October 10, 2001) Conclusion of Law No. 5 [hereinafter, "Tri Valley Decision"]. In the Tri Valley Decision, the Commission specifically noted that it had, in accordance with its statutory obligation, independently analyzed whether all elements of the proposed CPCN application were needed. *See id.* at pp. 5, 51, 57.

Other recent Commission decisions have underscored the CPUC's obligation to conduct need determinations. For example, the Commission has acknowledged that "Pub. Util. Code § 1001 places an ongoing responsibility on this Commission to evaluate the public convenience and necessity of proposed transmission projects, and therefore we independently assess the record developed in this proceeding to determine whether the [project] is needed on the basis of either reliability or economics." Decision 02-12-066 (December 19, 2002) at 7. The Commission has further acknowledged that "deference that consists of adopting the ISO's need assessment without conducting an independent review cannot substitute for our mandate to consider need for the Project under Section 1001." Decision 03-05-038 (May 12, 2003) at 12.

In sum, the CPUC governing statute makes clear, and the Commission has itself acknowledged, that it has no authority to delegate to another entity the responsibility for need determinations conferred on it by the Legislature.

B. Notwithstanding Contrary Assertions in the OIR, the CPUC's Proposed Delegation of Need Determinations Would Violate Section 1001.

In the OIR, the CPUC proposes to defer to the ISO's determination of whether a particular transmission project is needed, provided the ISO applies a CPUC-endorsed methodology to evaluate the transmission project. *See* OIR at 11. The CPUC asserts, without analysis or support, that this arrangement would be consistent with its obligation under section 1001: "The Commission believes that by adopting a . . . methodology that the CAISO and the IOUs will apply to transmission projects, the Commission would be fulfilling its statutory mandate under Section 1001, which places on the Commission the responsibility to determine that a utility project is needed." OIR at 9. The Commission's assertion that this arrangement would fulfill its statutory mandate is incorrect and overlooks the essential fact-finding role of the CPUC in determining whether individual transmission projects are needed.

1. The Determination of Need for Individual Projects Is an Essential Adjudicatory Function of the CPUC.

The structure of the CPUC, as authorized by the Legislature, allows the CPUC to serve in both legislative and adjudicatory (or "fact-finding") capacities. *See e.g.*, Pub. Util. Code § 1701.1; *see also id.* §§ 310-312, 1701-1710. The CPCN proceedings before the CPUC are clearly proceedings implicating the CPUC's adjudicatory function.² *See* Cal. CPUC Rules of Practice and Procedure 5, 6.1, 18. The Legislature has expressly set forth the requirements for CPUC hearings to gather evidence (Pub. Util. Code §§ 1701-10), and the Commission's CPCN proceedings typically require a hearing. CPCN proceedings are further characterized by the collection of factual information, and they are presided over by an Assigned Commissioner and/or Administrative Law Judge.

The OIR's proposal depends on the assertion that the CPUC can delegate its adjudicatory and fact-finding functions in CPCN proceedings as long as it exercises some quasi-legislative control over the methodology applied in such proceedings. This is an utterly baseless assertion. We have been unable to find, and the OIR does not cite, any other example of a similar delegation of responsibility by the CPUC to an outside entity. Likewise we were unable to find, and the OIR does not cite, any legal authority for such a delegation.

The CPUC additionally proposes that its delegation of need determinations to the ISO would not violate section 1001 because the CPUC would "validate" the ISO's application of the methodology to particular projects. The OIR provides absolutely no detail about how the Commission would validate the application of the methodology, but regardless of the details, this approach is not sufficient to eliminate the illegal aspects of the delegation. The OIR proposes that the Commission would

² We use the term "adjudicatory" to refer to proceedings, including proceedings classified by the CPUC as ratemaking and adjudicatory proceedings, characterized by fact-finding, weighing of evidence, and evaluating the truth of assertions.

merely review the ISO's fact-based evaluation of individual projects, not that the Commission would conduct the fact-based evaluation for itself. The CPUC cannot, by the artifice of "validating" the process of another entity, avoid its statutory obligation to conduct the weighing of evidence that is central to CPCN proceedings.

2. The Legislature Has Authorized Only Limited Delegation of the CPUC's Adjudicative and Fact-Finding Authority Under Public Utilities Code Sections 310 and 311.

Delegation of need determinations to the ISO would violate the Legislature's express mandates regarding delegation of fact-finding by the CPUC. Public Utilities Code section 310 provides in relevant part:

Any investigation, inquiry, or hearing which the commission may undertake or hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission. The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom the investigation, inquiry, or hearing has been assigned or, in his, her, or their behalf, by an administrative law judge designated for that purpose. Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission.

Pub. Util. Code § 310. Additionally, section 311 of the Public Utilities Code provides that "[t]he evidence in any hearing shall be taken by the commissioner or the administrative law judge designated for that purpose." Pub. Util. Code § 311; *see also* Cal. Const. art. XII § 2 ("Subject to statute and due process, the commission may establish its own procedures.") (emphasis added); Cal. Const. art. XII § 5 ("Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval."); *Southern California Edison Co. v. Railroad Commission of the State of California*, 6 Cal.2d 737, 757-58 (1936).

Thus, pursuant to sections 310 and 311, and the State Constitution, the CPUC has express authority to delegate the taking of evidence and fact finding to an assigned Commissioner and/or ALJ (subject to later confirmation by the Commission). The State Constitution and the Legislature have not, however, authorized the CPUC to delegate these adjudicatory functions to entities other than assigned ALJs or Commissioners. Indeed, state law suggests that such powers conferred upon public agencies and the officers of such agencies are in the nature of "public trusts and cannot be surrendered or delegated" – even to subordinates within the same agency – "in the absence of express statutory authorization." *See Cal. Sch. Employees Ass'n v. Pers. Comm'n of the Pajaro Valley Unified Sch. Dist.*, 3 Cal.3d 139, 144 (1970). Yet, the OIR proposes precisely such an improper delegation – indeed, a delegation outside of the agency and outside of government altogether, to the ISO.

C. The CPUC May Legally Recognize the Expertise of the ISO by Giving Due Deference to its Testimony in CPCN Proceedings.

The Riverside Parties do not dispute that the ISO has important expertise relevant to the CPUC's evaluation of whether new transmission facilities are needed for reliability or economic purposes. The CPUC can and should review the ISO's opinions regarding project need on a case by case basis in light of the specific facts presented. If the ISO presents a well-supported and compelling case for project need, the CPUC can place substantial weight in the ISO's judgment. If, however, cross-examination and the testimony of other parties reveals problems with the ISO's case, deference to the ISO's judgment would be improper. The obvious problem with the proposed modification of GO 131-D is the elimination of any opportunity for the CPUC and the public to question or refute the ISO's case for need.

II. The CPUC Cannot Legally Delegate its Authority to Make Need Determinations to the ISO, an Entity Entirely Lacking in Constitutional Due Process Guarantees.

A delegation of need determinations to the ISO is additionally improper because the ISO is not a governmental entity and does not provide the due process guarantees required in the context of adjudicatory proceedings such as CPCN cases. Adequate procedures are necessary to ensure that parties with protected interests (*e.g.*, property owners on the proposed right of way and ratepayers who would be required to pay for transmission improvements) have adequate notice that their interests are to be adjudicated, and a meaningful opportunity to be heard in that adjudication. *See Horn v. Ventura*, 24 Cal.3d. 605 (1979).

A. The ISO is a Corporation, Not a Government Entity.

The Legislature created the ISO as a non-profit public benefit corporation. *See* Pub. Util. Code § 345.5(a). The designation of the ISO as a "corporation" and the entity's organic statute demonstrate that the Legislature intended to establish the ISO with operational and grid management functions, not regulatory and adjudicative powers. *See id.* §§ 345, 346, 348. Because the ISO is not a governmental entity, it is not subject to a variety of laws guaranteeing fair and open decision-making (which are applicable to the CPUC³) including open meeting laws, public records and freedom of information laws, laws regulating ex-parte communications, and due process requirements. As described below, it is the experience of the Riverside Parties that the ISO's grid planning process does not facilitate public participation. The ISO lacks the institutional structure to perform governmental functions or provide protections for the public with regard to participation in its proceedings. Additionally, the Riverside Parties note that the deficiencies in the ISO's structure and process could not be rectified by the ISO's voluntary assumption of policies fostering more open review of its transmission planning process. Due process guarantees must be provided by law – not on a voluntary basis.

B. The Grid Planning Process of the ISO Lacks Constitutional Due Process

³ *See e.g.*, Pub. Util. Code § 306 (open meetings); *id.* § 311.5 (public notice of agendas).

Guarantees.

The CPUC is precluded from delegating CPCN need determinations to the ISO because the ISO fails to provide ratepayers and interested members of the public with required constitutional due process. The OIR proposes to defer to the results of the ISO's "Coordinated Grid Planning Process" for the determination of project need. *See* ISO Brief at 4; OIR at 5. The "Coordinated Grid Planning Process" is an informal "stakeholder process" designed to allow "review and comment" on transmission plans submitted by the utilities. *See* ISO Brief at 9. This "stakeholder process" does not provide the procedural due process protections required in CPUC proceedings and guaranteed by the United States and California Constitutions.⁴ *See* GO 131-D; CPUC Rules of Practice and Procedure; U.S. Const. 6th and 14th Amends.; Cal. Const. art. I, § 7. The ISO process is therefore an unacceptable substitute for the CPUC's existing CPCN procedures.

The ISO does not hold formal trial-like or other hearings at which interested parties can present their case in a meaningful manner and confront contrary evidence;⁵ it does not employ an impartial hearing officer or administrative law judge; it does not provide clear public notice of opportunities to be heard;⁶ stakeholder meetings are not transcribed and there is no official record created; the ISO's decisions need not be supported by substantial evidence;⁷ and the ISO's decisions are not subject to judicial review. In short, the ISO's "proceedings" offer none of the procedural protections required for legal adequacy. *See* 13 Cal.Jur.3d. (2000) Const. Law, § 277 *et seq.*

The lack of procedural safeguards afforded by the ISO's stakeholder process is not surprising, given the fact that the ISO is not a governmental entity, but a corporation responsible for operating the transmission grid. The lack of procedural safeguards would become a serious problem, however, if the CPUC were to defer to the ISO's adjudication of need as proposed in the OIR. Such reliance would undermine all future CPCN decisions approving transmission projects, rendering them legally vulnerable on due process grounds.

Additionally, as the operator of the grid, the ISO has a clear interest in the outcome of need determinations: it is not an impartial arbiter. The addition of new transmission facilities generally increases the options and flexibility available to the

⁴ The California Constitution expressly subjects the procedures of the CPUC to due process requirements. Cal. Const. art. XII, § 2 ("Subject to . . . due process, the commission may establish its own procedures.").

⁵ *Compare* CPUC Decision 03-05-038 (May 8, 2003) at 12 (The CPUC "CPCN process is a trial type proceeding that allows us to reach an unbiased decision.").

⁶ The ISO acknowledges that it provides notice of stakeholder meetings only by email to "market participants" who have affirmatively requested such notification. ISO Brief at 10. The CPUC, by contrast, has comprehensive notice requirements that attach when a utility files a CPCN application. *See* GO 131-D, Section XI.

⁷ For example, the ISO's tariff provides with regard to economic need that "[i]f neither any Market Participant nor the ISO disputes the Project Sponsor's showing, then the proposal is determined to be needed." ISO Tariff § 3.2.1.1.3.2.

ISO in its operation of the grid. As the operator of the transmission grid, therefore, the ISO has an inescapable institutional bias favoring the addition of new transmission facilities, notwithstanding other competing considerations.

The ISO's institutional bias in favor of new transmission facilities was readily apparent in the Valley-Rainbow proceeding, where it zealously advocated for the approval of the project long after it became apparent that the record before the CPUC did not support a finding of reliability or economic need. In the Valley-Rainbow case, the CPUC concluded that it would be inappropriate to delegate its need determination to the ISO, due to the ISO's role as an advocate for transmission, explaining that "the deference that the ISO and SDG&E urge upon us would amount to rubber-stamping the ISO determination. This would be particularly inappropriate, given the strong advocacy role played by the ISO in the Project proceeding." CPUC Decision 03-05-038 (May 8, 2003) at 12. In light of the ISO's clear interest in the outcome of need determinations generally, it cannot be considered an impartial arbiter of such questions. Allowing an interested party, such as the ISO, to preside over the determination of need clearly violates due process requirements.

C. The Riverside Parties' Experiences Illustrate the Due Process Problems that would be Created by Delegating Need Determinations to the ISO.

Based on their first hand experience with the ISO's procedures, the Riverside Parties can report that the ISO's procedures lack due process guarantees and that the CPUC's procedures allow for much more effective public participation. For example, the analysis of the Valley-Rainbow project by the ISO was conducted primarily at the staff level in meetings that were invisible to interested members of the public. No evidentiary hearings were held, and no provisions were made for cross-examination of utility witnesses before a neutral decision-maker. The consideration of the project by the ISO Board was not made in the context of adversarial proceedings and a complete record, but instead in the context of an unopposed staff recommendation.

A second more recent example of ISO procedures further underscores the impropriety of delegating the need determination to the ISO. The ISO's February 23, 2004 submission to the CPUC in this proceeding describes the ISO's review of proposed transmission projects as follows:

Subsequent to the submission of each PTO's annual [transmission expansion] plan, and for purposes of developing a CAISO Controlled Grid-wide integrated plan, the CAISO then initiates an open stakeholder process in February of the calendar year to ensure stakeholders are provided an early opportunity to review and comment on the transmission expansion plans submitted by the PTOs. (ISO Brief at 9).

When counsel for the Riverside Parties recently sought to learn about and participate in the 2004 stakeholder process described above, they discovered that it is not actually proceeding in the manner described by the ISO. Counsel for the Riverside Parties began by searching the ISO website for: (1) SDG&E's 2004 transmission expansion plan; and (2) information regarding the ISO stakeholder process that the ISO indicates it should have initiated in February 2004 to allow stakeholders the opportunity to review and comment on transmission expansion

plans submitted by SDG&E and other participating transmission owners (“PTOs”). Finding none of this information on the ISO website, we contacted the ISO by phone and learned the following:

- The ISO does not post any transmission expansion plans on its website, apparently due to the allegedly “confidential” and “sensitive” nature of the information contained in those plans. SDG&E, however, provided its plan on request.
- SDG&E, not the ISO, runs the stakeholder process for the annual SDG&E transmission expansion plan. The ISO apparently sends a staff person to participate in that process, but nothing more.

In short, the above-quoted ISO description of its transmission expansion review procedures is inaccurate and misleading. Contrary to the CPUC’s representations, it is difficult for interested members of the public to learn about PTO-proposed transmission expansion plans through the ISO due to the asserted “confidential” nature of the plans. The stakeholder process touted by the ISO is actually run by the utility, and thus, it is difficult or impossible for the public to have any meaningful input on that process. The ISO does not preside over any process that would encourage or allow public input on the plans. The CPUC should take notice of the public participation problems at the ISO and further investigate these problems before amending GO 131-D as proposed.

III. The Proposed Delegation Rests on a Number of Incorrect and Unjustified Assumptions.

- A. The OIR Improperly Assumes that Existing Procedures for the Evaluation of Proposed Transmission Lines Involve Inefficient Duplication at the ISO and CPUC.**

The OIR concludes, based on assumptions rather than concrete evidence, that the CPUC’s current CPCN process is flawed and inefficient because it needlessly duplicates the evaluation of need already undertaken by the ISO. As Commissioner Wood noted in his dissent from the OIR: “Without either proving the existence of duplication, or addressing the pluses or minuses of any duplication that might actually exist, the order presumes a problem and then declares the solution” OIR, Wood Dissent at 1-2. Based on their experiences before both the ISO and the CPUC in transmission proceedings, the Riverside Parties hereby attest that the present relationship between and responsibilities of the CPUC and the ISO are not needlessly redundant and should not be abandoned.

As discussed in greater detail elsewhere in these comments, the ISO and CPUC procedures for evaluating need are very different. Significantly, and at least in part because of the formal adjudicatory procedures of the CPUC, the ISO and CPUC do not always reach the same conclusion regarding whether a proposed project is actually needed. *See e.g.*, Decisions 02-12-066 and 03-05-038 (Valley-Rainbow case). Additionally, the CPUC weighs more factors in its analysis of proposed transmission projects. *See* Pub. Util. Code § 1002. The ISO, as the operator of the transmission grid, tends to favor new transmission facilities for the

simple reason that they tend to make the grid easier to operate. By contrast, the CPUC, which is responsible for regulating utilities and protecting ratepayers against needless expenditures, must conduct a more rigorous analysis of proposed projects. *See id.*

In light of the clear and unavoidable differences between the need evaluations undertaken by the ISO and the CPUC, it would be incorrect to conclude that those evaluations are needlessly duplicative.

B. The OIR's Proposed Delegation Rests on the Improper Assumption that Need Determinations Are the Product of Straightforward Application of Objective Standards.

The OIR and the "*Report on the Current Transmission Planning Process for Investor Owned Utilities*" prepared by The Division of Strategic Planning (December 29, 2003) ("OIR Staff Report"), on which the OIR is based, give the false impression that the evaluation of project need can be performed through the straightforward application of objective standards. Indeed, the OIR's proposal that the CPUC delegate the need determination to the ISO depends on the mistaken assumption there exists clear and simple methodology that can be applied, without the need for important judgment calls, to evaluate economic and reliability need. Determining need is a complex and subjective endeavor, requiring careful consideration of the particular facts of each case. The determination is not a product of rote application of standards. The end result of the evaluation is greatly influenced by the judgment calls made and inputs chosen by the evaluator.

1. The Evaluation of Economic Need is a Subjective Endeavor not Appropriate for Delegation.

The evaluation of economic need is a subjective endeavor and not appropriate for delegation. The evaluation of a transmission line for economic need is a complex process that involves use of sophisticated models. The CPUC has been evaluating economic models of the need for transmission lines and has yet to reach an agreed upon, validated model or even to determine that one model would be appropriate in all applications. Additionally, the assumptions and inputs to these model are strongly determinative of the results, and the application of these models to any particular project requires numerous judgment calls and factual determinations about scenarios. Given the nature of this process, it would be inappropriate for the CPUC to delegate the authority to apply economic models to particular transmission projects.

2. The Evaluation of Reliability Need is a Subjective Endeavor not Appropriate for Delegation.

It is important to recognize that the analysis of reliability need like the evaluation of economic need is a complex process involving innumerable critical judgment calls. Although certain industry standards exist, they cannot be

applied mechanistically like a mathematical formula might be.

Even the ISO recognizes that the application of reliability standards is "subjective." ISO Brief at 5. Due to this subjective nature, the analysis of reliability need can engender valid differences of opinion regarding the proper application of reliability standards to the facts of a given case. Such disputes should be resolved through the CPUC's trial-like process, not by the ISO in a stakeholder process. Delegation of such a discretionary decision outside of the CPUC would be improper.

C. The OIR's Proposed Delegation Rests on the False Conclusion that the ISO's Evaluation of Need Would Consider all of the Factors that the CPUC Must Consider in a CPCN Proceeding.

GO 131-D provides in relevant part that the CPUC's need determination must be based on whether the proposed "facilities are necessary to promote the safety, health, comfort, and convenience of the public" and whether "they are required by the public convenience and necessity." GO 131-D, Section III(A); see also Pub. Util. Code §§ 1002, 1003, 1003.5 (factors considered include project cost, community values, environmental concerns). This description of the criteria for evaluating need properly conveys the broad scope of considerations relevant to a need determination. By contrast, the criteria the ISO proposes to apply in its consideration of project need are apparently much narrower, namely, whether a project is needed for the reliability of the transmission system and whether the project is needed on economic grounds.

The ISO evaluation does not, for example, evaluate need based on the relative costs and benefits of a project to ratepayers.

It would be inappropriate to substitute the ISO's narrow perspective on need for the broader perspective applied by the CPUC. The OIR fails to acknowledge the critical differences between the ISO's criteria for evaluating need and the much broader set of criteria the CPUC is required to consider when evaluating need in a CPCN proceeding.

IV. Delegation of Need Determinations to the ISO Would Also Be Problematic from the Perspective of Environmental Impacts and Alternatives Analysis.

Under the CPUC's existing CPCN procedures, one entity – the CPUC – conducts and coordinates the consideration of the alleged need for a transmission line, possible alternatives to the project, and the potential environmental impacts of the project. Delegating need determinations to the ISO would artificially sever the consideration of project need from the evaluation of environmental impacts and potential alternatives.

A. Modification of General Order 131-D as Proposed Would Be Inconsistent with the California Environmental Quality Act.

Under the California Environmental Quality Act ("CEQA"), agencies proposing to approve projects impacting the environment must first identify,

mitigate and carefully consider all of the environmental impacts of the proposed project. *See* Pub. Res. Code § 21002, 21002.1; Cal. Code Regs., tit.14, § 15004(a). CEQA considerations are required to be “an integral part of any public agency’s decision making process, including, but not limited to, the issuance of permits, licenses, certificates, or other entitlements . . .” Pub. Res. Code § 21006. Additionally, CEQA prohibits any form of pre-approval of a project in the absence of environmental review. As such, the CEQA Guidelines provide that “[t]he environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively.” Cal. Code Regs., tit.14, § 15004(c).

The OIR’s proposal to delegate the determination of need to the ISO is clearly problematic under CEQA because the evaluation of need would occur well in advance of, and wholly separate from, the CPUC’s CEQA evaluation. As discussed below, the ISO’s procedures provide for no meaningful analysis of environmental impacts or alternatives. Thus, if the need determination were delegated to the ISO, it would not be informed by or coordinated with the CEQA analysis. The result would be an illegal early commitment to a proposed project, prior to the completion of the necessary CEQA review. The CPUC’s after-the-fact CEQA review would inevitably be a post-hoc rationalization of the proposed project approved by the ISO. This approach makes a mockery of and violates CEQA.

B. The OIR Is Based on the False Assumption that the ISO’s Transmission Review Process Includes the Careful Consideration of Environmental Impacts and Alternatives.

The Staff Report relied on by the OIR to justify its proposed amendments to GO 131-D does not fully and accurately reflect ISO procedures for the consideration of environmental impacts and alternatives. For example, the Riverside Parties question the accuracy of the following statements, especially as they relate to the ISO’s recent review of the Valley-Rainbow case:

In addition to yearly planning reports, the ISO has focus studies for major projects that are usually very difficult, expensive, and have large implications for reliability (e.g. Jefferson Martin, Valley Rainbow). A high level environmental review is conducted on project alternatives. Once a single project emerges from alternatives, a more in-depth environmental review is conducted by the utility. The time frame for project evaluation varies considerably between projects ranging from project evaluation that takes several months to more complicated projects that require years of development. The ISO Board approves projects that have an estimated cost greater than \$20 million. ISO management approves projects that have estimated costs less than \$20 million.

Once a project emerges from the focus study or yearly reports, the ISO asks the IOUs to seek a CPCN permit from the Commission. Before this point a lot of planning, consideration of alternatives, discussion with stakeholders, and other consideration has gone into the process. Historically, the CPUC has not

been formally involved in the ISO planning and project development process. By the time the project is before the CPUC for permitting, it has the ISO's support. OIR Staff Report at 10-11. (Footnote omitted).

In fact, in the Valley-Rainbow case, the ISO did not conduct a "high level of environmental review," did not give great consideration to alternative project routes and did not approve one project alternative as the result of its analysis. To the contrary, the ISO conducted no apparent analysis or review of environmental impacts and alternatives. In fact, it specifically approved the project "without regard to routing." In light of past practices, the CPUC cannot reasonably rely on the ISO to identify and evaluate environmental impacts and project alternatives in the future.

- V. The Proposed Delegation to the ISO Could Result in Unintended Consequences.
 - A. The Proposed Modification to GO 131-D Could Have the Unintended Consequence of Limiting CPUC's Ability to Require Utilities to Bring Forward New Transmission Projects for Evaluation.

The proposed modification of GO 131-D could result in an unintended adverse consequence for the CPUC's jurisdiction over transmission. Specifically, the proposed modification could limit the CPUC's ability to, on its own initiative, require utilities to bring forward new transmission projects for evaluation. The OIR does not address this possibility, but the CPUC should carefully consider this problem before amending GO 131-D as proposed.

The Staff Report on which the OIR is based notes that: "Historically the utilities have initiated infrastructure expansion. However, more recently the Commission has become more proactive in transmission matters by calling upon the utilities to bring forward potential projects (see Attachment B for status of the Transmission Investigation, I.00-11-001). This more hands-on approach to initiating transmission evaluation was prompted by AB 970." OIR Staff Report at 14.

The proposed modification to GO 131-D could limit CPUC's ability to continue this "more hands-on approach to initiating transmission evaluation" because if the ISO has declined to approve a given transmission project or specific alternative (after applying the appropriate methodology), the CPUC would be required to defer to the ISO's need determination, even if the CPUC believes the project or alternative to be necessary. The ISO could, in this way, dramatically narrow the options available to the CPUC to ensure grid reliability.

- B. The Delegation of Need Determinations to the ISO May Ultimately Be Broader in Scope than the CPUC Intends.

The delegation to the ISO of the CPUC's need determinations could result in additional delegation of authority or usurpation of authority by the ISO that the CPUC does not intend. The OIR's proposal raises the problem of limiting the ISO's authority in the context of the regulation of the electric utilities.

For instance, the ISO is actually seeking an even broader delegation of authority than that proposed in the OIR. The GO 131-D language proposed in the OIR would require the CPUC to defer to the ISO's need determination, provided that determination was based on the ISO's application of criteria (standards and methodologies) previously approved by the CPUC.

In its comments on the OIR, the ISO asks the CPUC to broaden its delegation further by eliminating the requirement of prior CPUC approval of the criteria applied by the ISO. The ISO is asking the CPUC to defer to its need determinations whether they be based on: (1) current ISO reliability and economic need criteria "approved" by the CPUC; or (2) future ISO reliability and economic need criteria that are not subject to CPUC review or approval. ISO Brief at 5, 18-20.

This kind of unrestrained, permanent delegation of authority to the ISO would clearly be illegal and unwise. Moreover, regardless of any attempt by the Commission to define the degree of the proposed delegation, such delegation would be a subject of interpretation by the ISO and the utilities in future CPUC proceedings, and the ISO and the utilities could assert their own interpretations as a defense to the CPUC's interpretation.

VI. The OIR's Proposal to Modify GO 131-D is Premature.

Modification of GO 131-D now would be premature because the proposal lacks the specificity required for guiding such a substantial delegation of authority and because the CPUC's proposal depends on the outcome of other CPUC proceedings that are still ongoing.

A. The OIR's Proposal Assumes the CPUC Will Participate in the ISO's Process, but Fails to Provide Any Guidance or Direction Regarding the Nature of Such Participation.

The Staff Report on which the OIR recommendation is based takes the position that if the CPUC delegates its need determination to the ISO, the CPUC should "be formally involved in the CAISO planning process as an upfront effort to provide input and foster a better understanding regarding why a particular project was chosen and what criteria and assumptions were used in its selection. This upfront investment in the CAISO process should facilitate a smoother review process once the project is before the Commission." OIR Staff Report at 28. The record is silent, however, regarding how this proposed CPUC involvement in the ISO process will actually be realized.

For example, it is unclear who will represent the CPUC and what their role will be in ISO deliberations. It would be premature and inappropriate to take action on the proposed amendments to GO 131-D in the absence of even the most basic information regarding proposed CPUC participation at the ISO.

B. The OIR's Proposal Is Premature Because it Depends on the Outcome of Two Ongoing CPUC Proceedings.

The true nature of the amendments to GO 131-D proposed in this proceeding can only be fully evaluated in light of the outcome of two other critical proceedings,

both of which are ongoing: (1) the CPUC's evaluation of long-term resource plans in its procurement proceeding (Rulemaking 01-10-024 and the successor proceeding initiated on April 1, 2004); and (2) the CPUC's evaluation of economic methodology in Investigation 00-11-001.

The OIR's recommendation that the CPUC defer to the ISO on the question of need is based on the following assumptions/conclusions about the outcome and conduct of the separate procurement proceeding: (1) the proceeding will result in the adoption for each utility of a long-term resource plan that clearly spells out the proper mix of resources (generation, demand-side resources, transmission) needed to satisfy reliability needs; and (2) the proceeding will include a "comprehensive analysis of how to meet need in a cost-effective, efficient, and environmentally sensitive manner." OIR at 6. Because the CPUC procurement proceeding is ongoing and has not yet resulted in adoption of any long-term resource plans, it would be premature to make these assumptions and conclusions. In fact, based on proceedings to date, these assumptions appear to be highly questionable. The CPUC should not commit itself to the OIR's recommendation until the true substance and results of the procurement proceeding are actually known.

Additionally, the CPUC should not commit itself to the OIR's recommendation regarding economic evaluation of projects until the economic methodology has been more fully evaluated. The CPUC is still evaluating the operation of economic assessment models and has made no determination regarding the general applicability of any particular model.

Thus, in addition to the legal bars to the delegation proposed in the OIR, the delegation is also premature. At a minimum, the CPUC should take no action to amend GO 131-D until: (1) the CPUC has approved at least one round of long-term resource plans for utilities; (2) the CPUC has adopted a methodology for evaluating economic benefits of proposed transmission projects; and (3) the CPUC has more completely explained its role in any ISO proceedings regarding need issues.

CONCLUSION

For the foregoing reasons, the Riverside Parties respectfully request that the CPUC take no action to modify GO 131-D as proposed in the OIR.

Respectfully submitted,

Cities of Temecula, Hemet
and Murrieta
Save Southwest Riverside County

By: _____
Osa L. Armi

Marc B. Mihaly
Osa L. Armi
Janette E. Schue
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: 415-552-7272

Facsimile: 415-552-5816
Email: armi@smwlaw.com

Dated: April 6, 2004

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VERIFICATION

Pursuant to Rules 14.5 and 2.4 of the Commission's Rules of Practice and Procedure, I, Osa L. Armi, hereby verify the factual assertions set forth in the attached *Comments of the City of Temecula, City of Hemet, City of Murrieta and Save Southwest Riverside County Opposing the Proposed Amendment to Commission General Order 131-D* ("Comments"). I am an attorney for the City of Temecula, City of Hemet, City of Murrieta and Save Southwest Riverside County ("Parties") in this proceeding. I was involved in the preparation of the Comments and believe the factual assertions set forth in that documents to be true. The Parties are not verifying the Comments because the Parties are located outside of the County or San Francisco and because the facts set forth in the Comments are best known to me.

I declare under penalty of perjury that the foregoing is true and correct.

Osa L. Armi

Signed April 6, 2004, in San Francisco, California.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the California Public Utilities Commission's Rules of Practice and Procedure and the Order Instituting Rulemaking (mailed 1/28/2004), I have this day served a true copy of:

**COMMENTS OF THE
CITY OF TEMECULA, CITY OF HEMET, CITY OF MURRIETA
AND SAN SOUTHWEST RIVERSIDE COUNTY
OPPOSING THE PROPOSED AMENDMENT TO
COMMISSION GENERAL ORDER 131-D**

on parties on the service list for this proceeding. Service was effected by the following means:

- All parties on the service list for whom electronic mail addresses are provided were served by electronic mail.**
- All parties on the service list whom electronic mail addresses are not provided were served by U.S. Mail.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 6, 2004, at San Francisco, California.

Patricia S. Nolan